

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2147

To be Argued By
LAWRENCE STERN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
JESSE PUGH,

Petitioner-Appellant,

-against-

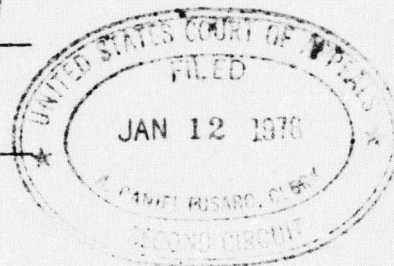
SUPERINTENDENT, CLINTON
CORRECTIONAL FACILITY,

Respondent-Appellee.
-----x

B
AS
Docket No. 77-2147

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF FOR APPELLANT



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ARGUMENT

POINT I

SINCE THE TRIAL COURT PRIVATELY INTENDED PROBATION, OR PROBATION CONSIDERATION, ONLY ON THE IM- POSSIBLE CONDITION THAT APPELLANT BE DIAGNOSED AS TOTALLY CRIPPLED FOR LIFE, BUT OMITTED THIS CON- DITION FROM HIS ON-THE-RECORD STATEMENT OF THE PLEA AND SEN- TENCE CONDITIONS, AND SINCE ANY REPORTS SUBMITTED COULD NOT POSSIBLY CONTAIN SUCH A REQUIRED DIAGNOSIS AND SINCE THE STATE JUDGE HELD THAT NO REPORTS WERE SUBMITTED IN ANY CASE, APPELLANT WAS DEPRIVED OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW, EFFECTIVE ASSISTANCE OF COUNSEL AND THE PRIVILEGE AGAINST SELF-INCRIMINA- TION-----	15
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UNITED STATES COURT OF APPEALS
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JESSE PUGH,

Petitioner-Appellant,

-against-

Docket No. 77-2147

SUPERINTENDENT, CLINTON
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Respondent-Appellee.

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ISSUES PRESENTED

1. Whether, since the trial court privately intended probation, or probation consideration, only on the impossible condition that appellant be diagnosed as totally crippled for life, but omitted this condition from his on-the-record statement of the plea and sentence conditions, and since any reports submitted could not possibly contain such a required diagnosis and since the State Judge held that no reports were submitted in any case, appellant was deprived of the Fifth, Sixth and Fourteenth Amendment rights to due process of law, the effective assistance of counsel and the privilege against self-incrimination.

STATEMENT PURSUANT TO RULE 28(a)(3)

1. Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York [Stewart, J.] entered November 10, 1977, denying, after a hearing, appellant's application for a writ of habeas corpus.

Timely notice of appeal was filed; the District Court granted probable cause to appeal and leave to appeal in forma pauperis.

2. Statement of Facts

A. The Procedural History

By these proceedings, appellant seeks to have vacated a judgment of the County Court of Westchester County rendered May 10, 1972, convicting appellant, after a plea of guilty, of the crime of robbery in the second degree and sentencing him to an indeterminate term of imprisonment of seven years.

Appellant is presently confined on a different charge in a State prison in Somers, Connecticut, where a detainer warrant is lodged against him on the basis of the Westchester County judgment.

Following the Westchester County conviction and while incarcerated there, recovering from spinal operations from a gunshot wound in the back, appellant made pro se motions, in the form of letters treated as such, to vacate his sentence and the judgment against him, claiming that a sentence promised to him had not been fulfilled and that his counsel had knowledgeably allowed this to occur. His motions were denied by the County Court on August 8, 1972, and December 20, 1973, and leave to appeal to the Appellate Division was denied on March 12, 1974. In September, 1974, appellant filed pro se his application for federal habeas corpus relief claiming inter alia that the stated terms of the plea bargain had not been fulfilled. In a "rebuttal" affidavit to the Attorney General's reply he stated,

"...that the type of sentence was discussed in conference (but no minutes taken as it should be) and agreed for a plea of guilty. This method left petitioner in the hands of the Court and his attorney."

On June 5, 1975, the District Court denied appellant's application without a hearing on the basis of the minutes of the plea, which reflected no unfulfilled sentence promise. Appellant, still pro se, sought a probable cause

ruling from this Court and the assignment of counsel. In one decision, this Court granted probable cause, ordered assigned counsel and remanded the case to the District Court for a hearing.

On July 9, 1976, a hearing was held, and on November 7, 1977, the District Court once again denied the application, but granted probable cause to appeal to this Court.

B. The Misrepresented and
Unfulfilled Plea Promise

Appellant, Jesse Pugh, was shot by a police officer in the back while unarmed in an alleged robbery attempt in Port Chester, New York, on December 21, 1971. He was taken to United Hospital and operated on there, and bullet fragments were removed from his spine, leaving him paralyzed from the waste down. He was told by Dr. Gang, the surgeon, that it was doubtful he would regain most of his physical abilities, but there was no way to say definitely that he'd be crippled for life (15-17).^{*} Appellant was transferred to Grasslands Hospital where he was given back and leg braces,

^{*}Numbered references are to pages in the transcript of the hearing below.

a cane, and various pain dulling medications. He lost his bowel and urinary functions. At Grasslands, Dr. Rohman told him he would have to learn to live with limits, although some functioning might return (19-22). (See the hospital records which detail appellant's operations and the history of his condition. (Exhibits below.))

Appellant stayed at Grasslands Hospital until March, 1972, when he was transferred to the Westchester County jail. There he met with his co-defendant, Samuel Ferguson, who told him that his (Ferguson's) attorney had said that if both men pleaded guilty, they'd both get probation (25-26). Appellant's attorney, Samuel Lerner, visited appellant and asked him from the beginning of their discussions if a plea of guilty, with a promise of probation, would be acceptable. Lerner told appellant that the spinal injury, the fact that he still owed time in Pennsylvania, the facts that he had been unarmed and that all the money was recovered would all work in his favor toward a sentence of probation. Appellant accepted this deal, and the possibility of going to trial was not discussed (26, 27, 64).

On April 10, 1972, appellant met Lerner in the County Court holding pens, and there Lerner explained to

him that he would plea to a lesser offense which would enable the Court to sentence him to probation (29). In open court, the judge told appellant that there was the possibility of probation pending the receipt by the judge of doctors' reports. Specifically, the judge stated to appellant,

"Mr. Pugh, in conference today with your attorney and the District Attorney and the last time we had a conference, I've stated that due to your physical condition I was considering a Class D felony sentence...with the possibility of probation if your physical condition can be determined on the sentencing date by a qualified neurosurgeon."

(minutes of 4/10/72 at p. 5)

Appellant, after a conversation with Lerner, during the proceedings, took this to mean that the reports were a pre-condition to his sentence of probation, and that the reports would diagnose his physical condition as it was and as he knew it to be. From his discussions with the doctors, appellant knew that no doctor would say that he'd be permanently paralyzed for life, and he would never have assented to a probation pre-condition that the reports reflect such a diagnosis (29-30, 33, 36).

After the guilty plea was entered on April 10, appellant was returned to Grasslands Hospital to be operated

on for the gunshot related bladder stone operation which required the insertion of an instrument through his penis. He received more pain killing drugs. Lerner visited him prior to the first sentencing date of May 8th. Lerner didn't have any reports, but he told appellant that there was no problem. Appellant spoke to co-defendant Ferguson who did receive from the court the promised sentence of probation. On May 8th, in court, appellant protested that Lerner had not yet received reports. There was a lot of confusion and appellant threatened to withdraw his plea and the Judge adjourned the sentencing. On May 10, Lerner still did not present reports in open court. Appellant objected once again; Lerner spoke to him outside the courtroom and said everything would be "all right," which, to appellant, meant he would still get probation. Appellant's mother and woman friend, Christine, were there and they, with Lerner, urged appellant to go ahead with the sentencing. Back in the courtroom, the Judge said there were no reports so probation would not be considered and he sentenced appellant to seven years prison. Appellant protested again, but the court told him to take it up on appeal (31-40, 53-54, 65). (The County Court misplaced the

May 10 sentence minutes).

Shortly after the sentence, appellant wrote the letters to the Court and to Lerner asking that his physical condition be considered as promised. He did not complain to Lerner about the effectiveness of his representation, because he didn't think Lerner could or would do anything; he thought he had recourse only to the Judge. He didn't even know that his letters would be treated as legal motions (41, 57, 59).

Appellant was transferred to Pennsylvania where he was operated on again (42). At the time of the hearing, he still wore leg and back braces and required a cane for walking and he still received medication. (43-44.)

Appellant asked the District Court to vacate his sentence and order his resentencing according to the original bargain (44).

Joseph W. Rakacky testified that he was the Assistant District Attorney who prosecuted appellant. He offered the reduced plea to robbery in the second degree because appellant, unarmed, had been shot in the back by the police officer and was seriously injured and because all the bank money was recovered, and the reduced charge would enable

the Court to impose a lighter sentence (72, 84).

Mr. Rakacky received a letter from Mr. Lerner on February 8th which included a letter from Dr. Rohman of Grasslands Hospital. On the basis of this letter to the effect that appellant could not come to court, the District Attorney consented to an adjournment (73, 84-86). There may have been no court appearance (87-88).

Prior to the plea proceedings of April 10, the Court and the District Attorney considered probation because, "if he was going to be bedridden for a substantial or extended period of time, or even confined to a wheelchair, there would be no reason to send him to State prison." (78). There was some discussion in chambers about "the possibility of probation for this man, if he were paralyzed for life, bedridden..." (88).

"If he were confined to bed, if he were paralyzed from the neck down, it wouldn't make any sense to send a man to State prison."

(89)

During the April 10th plea proceedings, Mr. Rakacky asked the Court to explain the substance of these discussions to appellant, and Mr. Rakacky did not object when the Court said only that there was a possibility of probation if

appellant's condition was diagnosed and presented to the Court on the day of sentence (90-91). No mention was made of a specific diagnosis of total paralysis required for probation. Subsequently Mr. Rakacky offered the robbery second degree plea to co-defendant, Samuel Ferguson, and Ferguson received a sentence of probation. This fact was used by appellant's counsel in arguing in-chambers for the same sentence for his client (86-87).

At a pre-sentence, in-chambers conference on the sentencing date, appellant, through his counsel, was still seeking probation. The Court said it would not give probation and Mr. Rakacky "thinks" the Court offered withdrawal of the plea. Sentencing was adjourned for two days; the plea remained in effect and appellant was sentenced to seven years (75). Mr. Rakacky did not testify to seeing appellant's counsel show neurological reports to the judge in-chambers or at any other time.

Mr. Rakacky would not have recommended the plea if the Court had promised probation. His practice, however, was not to get involved in sentencing and he took no position on it (77, 96).

Mr. Rakacky also testified that the County Court file should, and does, contain all official court records in this case (82).

He knew Assistant District Attorney Gruber, and he knew that Gruber submitted an affidavit for the District Attorney's Office in this case, but he doesn't remember talking to Gruber about the case (91-92).

Samuel Lerner, appellant's assigned counsel in the State case, testified that by the April 10th plea proceedings, he believed that appellant had a strong possibility of receiving a sentence of probation (102-103, 137). He understood his obligation to obtain updated medical reports after the plea proceedings (105), reports which would define the degree of permanent disability (108-109).

Although Mr. Lerner had the impression that the judge would give probation if appellant were diagnosed to be "permanently crippled," (109), "permanently and irrevocably crippled," (130), he knew that the doctors would not give such a report (131), but he did nothing in open court on April 10 when the judge stated that probation was a possibility if appellant's physical condition could be diagnosed on the sentence date. He did nothing to correct the state-

ment even though the Judge,

"...had gone in open court somewhat beyond what he had suggested in chambers ...did create a certain confusion and he went further than he probably intended to go in using that language in open court. I did not receive that sort of promise in conference."

(110)

He did nothing even though the Judge gave the impression that the submission of a report would result in probation or at least the possibility of probation, even though this is not what the judge intended in chambers (133).

Mr. Lerner testified that in chambers on May 8th, he showed the Judge a letter from Dr. Kenneth Gang, and, that the Judge said he would not give probation because of appellant's prior record of which the Judge was aware at the time the plea was entered on April 10th. The Judge also told Lerner that any application to withdraw the guilty plea would be denied (112-115). When appellant learned this, and upon Mr. Lerner's "pushing" to take the plea, he withdrew his application to withdraw the plea (116, 132).

Mr. Lerner did not enter the Gang letter in evidence or do anything else to document its presentation to the Court (121-122), even though it was his practice to send covering letters or to otherwise document his own submission

of documents to other parties (122-127).

Mr. Lerner did not order the sentence minutes or file a notice of appeal for appellant, claiming, despite appellant's letters to him asking for help "in the thirty day period," that appellant did not want to appeal (123-124, 129).

He testified, contrary to Mr. Rakacky, that the District Attorney was adamant for a jail sentence in the case.

C. The Documents

Several documents, evidencing important facts in the case, were entered into evidence at the hearing. They are referred to in the argument section of this brief, infra.

ARGUMENT

POINT I

SINCE THE TRIAL COURT PRIVATELY INTENDED PROBATION, OR PROBATION CONSIDERATION, ONLY ON THE IMPOSSIBLE CONDITION THAT APPELLANT BE DIAGNOSED AS TOTALLY CRIPPLED FOR LIFE, BUT OMITTED THIS CONDITION FROM HIS ON-THE-RECORD STATEMENT OF THE PLEA AND SENTENCE CONDITIONS, AND SINCE ANY REPORTS SUBMITTED COULD NOT POSSIBLY CONTAIN SUCH A REQUIRED DIAGNOSIS AND SINCE THE STATE JUDGE HELD THAT NO REPORTS WERE SUBMITTED IN ANY CASE, APPELLANT WAS DEPRIVED OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW, EFFECTIVE ASSISTANCE OF COUNSEL, AND THE PRIVILEGE AGAINST SELF-INCRIMINATION.

A. The Impossible, Unstated Probation Condition

The District Attorney, appellant's assigned state counsel, and the Court below all concede that during the plea negotiations, the State Judge clearly expressed in-chambers his intention not to sentence appellant to probation unless appellant were going to be totally paralyzed and bed-ridden for life from the gunshot wound in the spine he suffered at the hand of a policeman while he (defendant) was unarmed (78, 89, 130). The fact is also uncontested, as the plea minutes quote, that in open court the Judge held out to appellant the possibility of probation but without the caveat

that it would be conditioned on a diagnosis of total paralysis.

THE COURT: Mr. Pugh, in conference today with your attorney and the District Attorney, and the last time we had a conference, I stated that due to your physical condition I was considering a Class D felony sentence... with the possibility of probation if your physical condition can be determined on the sentencing date by a qualified neurosurgeon.

(Minutes of 4/10/72 at p. 5)

Appellant's counsel at the hearing below conceded that this statement of the plea bargain did not reflect the Judge's true intentions as expressed in-chambers.

Judge Couzens had gone in open court somewhat beyond what he had suggested in chambers. I think...the Judge did create a certain confusion and he went further than he probably intended to go in using that language in open court. I did not receive that sort of a promise in conference. (110)

I don't think in the conference he ever indicated directly that merely by producing a medical report we would automatically get probation, whereas on the record when he gets back into open court, the language that he used appeared to give that impression." (133)

The Court below found as a fact, "Judge Couzens was willing to consider probation seriously only if Pugh

was severely paralyzed for life." (Memorandum decision at p. 3). Yet, this is not what the Judge told appellant from the bench.*

Thus, while the language the State Judge used in open court "appeared to give the impression" that probation was a possibility pending the receipt of a medical diagnosis of appellant's condition, in fact probation was not possible, and the Court could not have intended it to be a realistic alternative disposition. Appellant was already ambulatory on April 10th when the plea bargain was struck; he walked into court with the aid of crutches (48, 102), and the hospital reports, of which, at least prosecutor and counsel were aware, were diagnosing a condition short of total paralysis, rather one of weakness that could improve somewhat with time and which at the time of plea permitted assisted ambulation. (See the hospital records and the letter of the doctors dated February 4, 1972 and April 14, 1972, Exhibits below). For example, upon appellant's discharge from United Hospital on

*The Court below in a footnote quoted the State Judge's in-court plea promise, and found as a fact the State Judge's conflicting actual intentions expressed in-chambers, but failed to recognize the legal significance of the difference, although the arguments were presented below.

December 29, 1971, after his first operation and four months before the plea, Dr. Kenneth Gang wrote,

"...there was prompt and marked return of function...sensation appeared to be improving steadily. Proximal leg muscles began to function fairly well although ankle improvements remained poor. Improvement continued..."

Records of Grasslands Hospital noted in March, 1972, a month before the plea, "Patient is independent in ambulation with two canes and short leg brace on right side. He is independent too in transfers and stairs." And, on April 14, 1972, four days after the plea, Dr. Gang wrote to Mr. Lerner,

"Mr. Pugh had a serious injury to the nerve roots within the spinal column, but was fortunate in that he recovered a surprisingly great amount of function after operation. With the aid of rehabilitation techniques, he was able to be ambulatory at the time of discharge from Grasslands Hospital, but still had significant weakness and sensory loss in the lower legs. I believe that a good deal of this disability will be permanent, but it is too soon to say with certainty."

Ultimately, at a pre-sentence conference, the Judge, according to Lerner, told Lerner that the reports were not sufficient because they did not state, "absolutely, uncategorically that Mr. Pugh was totally and permanently disabled."

(136).*

Mr. Lerner testified that the Judge was well aware of appellant's criminal record at the time he made the promise of April 10th (113-114), and the Judge could see that appellant walked into court with the aid of crutches on that date. Thus, as far as the Judge was concerned, nothing that occurred between the plea proceedings and the sentence could possibly have resulted in appellant's obtaining a sentence of probation, because all the information that mitigated against such a sentence, according to the Judge's understanding of the bargain, was already in the Judge's possession at the time of plea. Indeed, in response to appellant's first letter to the Judge, written ten days after the sentence, in which, once again, appellant attempted to have the Judge consider his paralysis in reconsidering the jail sentence, the Judge admitted for the record that appellant's physical condition was irrelevant to the Judge's decision to send him to jail.

"Although this Court is sympathetic to the defendant's physical condition, this Court is also mindful of the fact that this condition was caused by defendant's

*Of course, the Judge, in his written opinion denying appellant's motion to vacate the sentence, found that no report had even been submitted. Either none was, or if it was, it had no significance for the judge since it did not contain the required diagnosis and he hardly noticed it and did not remember it. See discussion, infra.

criminal behavior.

(Order of August 8, 1972,
Ct. Ex. #2)

Appellant testified at the hearing below that he was not present in chambers, that he heard the Judge's words in open court and understood their plain meaning to be a promise that his condition as it was, and as he knew it to be, would be a factor in the judge's consideration of probation. At no time was he informed that the Judge's real intention was to consider probation only upon a diagnosis of total bed-ridden paralysis. Indeed, Mr. Lerner, his lawyer, told appellant, after the plea conference in chambers, that there was still a possibility of probation, even though Lerner had been there in-chambers when the Judge stated to him and the Assistant District Attorney the impossible condition the Judge had actually set for probation (111). Neither Lerner nor Rakacky, both of whom had been in-chambers prior to the open court proceedings, corrected the Judge's in-court statement, even though Lerner admitted to perceiving that the Judge "went further than he probably intended to go in using that language in open court," (110), and even though Lerner knew as early as February 4th that no doctor would give him a diagnosis of permanent and total paralysis (131),

and even though the Judge's statement was in response to Mr. Rakacky's request for an accurate description of the in-chambers conferences.

Appellant understood he was pleading to a reduced charge to enable the judge to give probation (52); the maximum seven year sentence could have been imposed on the higher class felonies with which he was initially charged and there would have been no need for the reduction to Class D. Appellant testified below that Lerner explained this to him, and Lerner confirmed it (112). Thus, under all these circumstances, appellant believed, and reasonably so, that he would either receive a sentence of probation just as his co-defendant had received before him, or, at the very least, probation would be seriously considered on the basis of his damaged physical condition albeit short of total paralysis, as the doctors had explained it to him. (16-23, 66-67) A bargain for possible probation conditioned on total paralysis, the bargain, unbeknownst to appellant, actually in effect, could not possibly bring him probation since he knew he could not fulfill that condition. Probation was key to appellant since the agonies of imprisonment would be multiplied for a cripple in constant pain.

The District Attorney agreed to the reduced plea for appellant in this case where he had already agreed to probation for an uninjured co-defendant, where all the proceeds from the attempted bank robbery had been recovered, where the defendants had been unarmed, where no one, but appellant, had been injured, and where the prosecutor would have had to try an unarmed defendant who had been shot in the back by a police officer (72, 84). He took no position on the sentencing (76, 96).

Given these facts, appellant's sentence is the unconstitutional result of ineffective counsel's failure to clarify what he himself characterized as a misleading plea promise when he was aware of the Judge's true intentions expressed outside the presence of appellant, and it is the result of a deprivation of due process and the failure of the State Judge to fulfill the promise as he stated it on the record in the presence of the appellant. "When a plea rests in any significant degree on a promise or agreement of the prosecutor [or judge], so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262 (1971). In Santobello, as here, the defendant bargained for a plea to

a lesser offense. Although, as here, he got that, he didn't get another part of the bargain: in Santobello, a promise that the prosecutor would make no sentence recommendations; in this case a promise that, at the least, probation would be seriously considered based on his physical condition at the time of sentence according to doctors' reports which were to be submitted as a pre-condition to the probation possibility. Since this latter promise was clearly stated by the judge on the record and since it was clearly part of the inducement to taking the plea, it must be fulfilled by the State courts. It matters not that the failure to keep the promise was inadvertent on the part of the judge who stated his intentions erroneously, or inadvertently on the part of the defense counsel who failed to ensure its clarification. "That the breach of the agreement was inadvertent does not lessen its impact." Santobello v. New York, 404 U.S. 257 (1971).

Whether it was the lawyer who neglected his job or the judge who created a misapprehension in the mind of the appellant, the recorded facts are that appellant was reasonably led to believe, albeit erroneously, in the possible efficacy of doctors' reports which were actually considered

irrelevant by the sentencing judge. The case in point in this Circuit, Mosher v. LaVallee, 491 F.2d 1346 (2d Cir. 1974), cert. denied, 94 S. Ct. 1611, reversed a sentence when only counsel was responsible for the mistaken inducement of the plea; here the facts show the additional participation of the sentencing judge in the same kind of false promise situation, however inadvertent.

"The state prisoner has sustained his burden of proof in that the circumstances as they existed at the time of the guilty plea, judged by objective standards...reasonably justified his mistaken impression--here a false statement by defense counsel to Mosher that a promise of a minimum sentence had been made by the judge who thereafter imposed the maximum sentence. (491 F.2d at 348).

In Mosher, as here, the defendant according to this Court, was deprived both of the effective assistance of counsel and of a knowing, intelligent and voluntary guilty plea by the resultant misrepresented and unfulfilled promise. See also Palermo v. Warden, 545 F.2d 286 (2d Cir., 1976). Here, in addition, the trial court failed in its responsibility to ensure a true understanding of the consequences of the guilty plea. United States ex rel. Leeson v. Damon, 496 F.2d 718 (2d Cir., 1974); United States ex rel. Hill v. Lernullo, 510

F.2d 844 (2d Cir., 1975); Glasser v. United States, 305 U.S. 60 (1942); Brady v. United States, 397 U.S. 742, 755 (1970). Upon the remand for sentencing, obviously before a different judge, the hospital reports and doctors' reports of his condition in 1972,* would be presented and due consideration would finally have to be given to the possibility of probation based on the 1972 state of affairs. The sentencing court, according to the view of the bargain that probation was to be considered, not promised,** might still deny probation, but this time, with effective counsel at his side, appellant could make a proper record and protect his rights to appeal an unreasonable or excessive disposition.

Resentencing according to the bargain is the relief appellant has sought all along; he has not in any legally cognizable sense sought the withdrawal of his guilty plea, nor was this opportunity actually afforded him. (See the post-conviction letters, Ct. Exs. #9, 10, 11). The

*The bargain was struck on the basis of his condition at that time. He should not lose the benefit of the bargain because of the intervening three years he spent in prison while attempting to get the courts to recognize his claims. At the time of the hearing, he was still wearing back and leg braces and needed a cane for walking.

**Appellant testified that he was led to believe he'd probably get probation and with this view of the bargain, of course, that is the sentence he should receive.

record of what occurred on May 8th and 10th, the two sentencing days, is totally confused, as was, no doubt, the mind of appellant, drugged and recently having undergone an extremely painful second operation for bladder stones caused by infection from the spinal wound (neurogenic bladder, see hospital reports, Pet. Exs. #1 and 2). Mr. Lerner's testimony coincides with that of appellant on the question of whether appellant was actually given the opportunity to withdraw his plea once the Court made its position clear that there would be no probation in the case (either because no reports were submitted to him (see infra) or because he never really intended to give such a sentence unless appellant became a vegetable between plea and sentence). Appellant testified that after the Court finally imposed sentence on May 10th, he objected because reports were supposed to have been submitted; his prior objections on May 8th and 10th had been ignored, and counsel had assured him that everything would be all right and advised him that a withdrawal application would be inadvisable, unnecessary and fruitless. Nonetheless, the Court was still imposing upon him a prison term. He had not really wanted a withdrawal of the plea, although in the hullabaloo of May 8th and 10th he may have

used that word, but only as a means of getting the Court and counsel to keep the bargain. Finally, however, when all his protestations were ignored and the Court imposed a seven-year prison term, he objected once again and the Court ignored him once again and refused redress of any kind, directing appellant to "take it on appeal" (38-40, 53-54, 64).

Lerner corroborates the fact that no real opportunity to withdraw the plea was afforded appellant. He testified that on May 10th in chambers, the Court told him that (1) there would be no probation and (2) "our application to withdraw the plea would be denied" (115). Thus, when they came into Court on May 10th, appellant was told by Court and counsel that he had no choice but to accept the Court's sentence of prison, because any motion to withdraw would be denied anyway.* Thus, not even this part of the April 10th plea bargain was kept, i.e., the opportunity to withdraw, and even if it had been afforded, any decision was

*The extract of the May 10th sentence proceedings is not proof of more than the bare bones of what took place that day. The extract says only that the motion to withdraw the plea was itself withdrawn but this would refer only to appellant's capitulation to what he'd already been told by counsel to the effect that his application was going to be denied. The extract does not reflect this, which is corroborated by counsel. It does not reflect the fact that appellant protested again once sentence was imposed.

coerced and unknowing because his counsel had been ineffective and because the Court had never really intended probation. It should also be noted that in its December 20, 1973 decision, the trial court did not mention any refused offer of plea withdrawal, but rather based its decision on the fact that appellant did not keep his side of the bargain, failing to provide the reports. If an opportunity to withdraw had actually been turned down by appellant, the Court could have mentioned this as an alternative basis for the fact that the Court's side of the bargain had been kept, but this was not mentioned. Also, the District Attorney, in his testimony on this hearing, is not clear as to what occurred on May 8th and 10th and could only testify that he "thinks" an offer of withdrawal was made (75). Even if made and refused by appellant, under the circumstances of this case it would be an uncounselled or ineffectively counselled waiver, coerced by the Judge's pre-determination to deny it, and unknowing because of appellant's physical condition and drugged mental state. If even appellant's total silence at the sentencing would not bar relief, what occurred in this case should not deprive him of the promise. United States v. Hammerman, 528 F.2d 326 (4th Cir., 1975); People v. Esposito,

32 N.Y. 2d 921 (1973).

Since appellant does not seek vacatur of the plea, and since, according to Santobello v. New York, supra, this Court could not remand to the State with such an order, and since the issue here, as defined by this Court, is remand for resentencing, the remedy, we submit, is remand for resentencing according to the plea bargain as defined in the April 10th proceedings or as testified to by appellant. Furthermore, vacatur of the plea is not sought by the petitioner, and where such vacatur would place either the State or the petitioner in a worse position by virtue of the unfulfilled promise, specific performance is the authorized disposition. Santobello v. New York, supra; Palermo v. Warden, 545 F.2d 286 (2d Cir. 1976); People v. Esposito, 32 N.Y.2d 921 (1973); People v. Selikoff, 35 N.Y.2d 227 (1974); People v. Santobello, supra; People v. DiWolfe, 36 A.D.2d 618 (2d Dep't, 1971).

When it came to the sentencing date in this case, the just disposition would have been submission of the reports, due consideration to them, and either the sentence of probation or some explanation as to why a paralyzed man should be sentenced to seven years imprisonment. This was the basic on-the-record promise. Since the promise should

have been fulfilled at sentencing and was not, and since appellant seeks its fulfillment now, as he has since his initial letter to the Judge soon after the sentence five years ago, he is entitled to a remand to the State Court for resentencing according to that promise. Santobello v. New York, supra; People v. Santobello, 39 A.D.2d 654 (1st Dep't, 1972).

B. Absence of Alternative Remedies and this Court's Remand Order

This question of the unkept plea bargain has been raised by appellant all along in his fight for resentencing. He phrased it in the State courts in his pro se papers as an unfulfilled promise of probation, which was a reasonable assumption under the circumstances described and given appellant's exclusion from the in-chambers negotiations and his lack of precise legal knowledge. He did not know the in-chambers facts revealed at the hearing below for the first time, since the State courts had refused to accord him the airing of the facts on his pro se motions. In his original habeas petition in the Southern District, he did, however, specifically refer to dishonored terms of a plea bargain. He repeated these allegations in a letter to Judge Stewart

in June, 1975, and in a rebuttal affidavit he wrote,

"The Westchester County plea-bargaining method had many irregularities and was not in the best interests of justice; that the type of sentence was discussed in conference (but no minutes taken, as it should be) and agreed for a plea of guilty. This method left the petitioner in the hands of the court and his attorney."

That his state remedies on the questions of his plea and sentence were exhausted has never been questioned by the Attorney General. The trial court characterized appellant's post-conviction motion as including a claim that "[appellant] was deceived by a promise with respect to sentence" (Order of December 20, 1973). In his original affidavit in opposition to the habeas petition, the Attorney General wrote,

"...as best as we can infer from petitioner's papers, his only objection to his conviction arises from a belief that it was the product of a broken sentencing promise.... This particular claim has been exhausted in the state courts through a motion to vacate sentence. It was denied by Westchester County Supreme Court (Couzens, J.) on August 8, 1972 and again on December 20, 1973; leave to appeal was denied by the Appellate Division, Second Department on May 12, 1974."

(Affid. of AAG David R. Spiegel,
filed 11/6/74 at p. 5 & p. 5n.)

In his first opinion on the case in June, 1975, Judge Stewart found that as to "the unlawful nature of the plea,"

"Pugh brought the same claim in the state courts thereby exhausting his state remedies."

(Memorandum decision 6/6/75 at p. 2, see Appendix)

This finding was repeated in the second decision of November 7, 1977.

This Court's original remand for a hearing on "the ineffectiveness of counsel at sentencing" was ordered without the benefit of the facts the hearing revealed. Since these facts are encompassed within appellant's original legal complaint, and since they do support a claim of counsel's ineffectiveness at sentencing and plea, as well as a misrepresented and unfulfilled sentence promise in which counsel played a part, any argument by the Attorney General that they should be overlooked as outside the remand order is without foundation in law or logic. Judicial efficiency is effected by considering these facts in the context of the legal issues raised, rather than requiring appellant to bring a new petition. The habeas statute and its gloss require liberal use of the amendment provisions which appellant in-

voked below as insurance. 28 U.S.C. § 2242; Fed. R. Civ. P. 15(a); Holiday v. Johnston, 313 U.S. 342, 350 (1941). Appellant has been fighting this case for five years in the state and federal courts; it took two years of litigation in the federal courts, while appellant was pro se, to obtain this hearing, and another year before a decision was rendered thereafter. This Court has recently expressed an unwillingness to carry the technicalities of pleadings to such a length that the prisoner is exhausted before his remedies. Bergman v. Lefkowitz, Docket No. 77-2123 (December 19, 1977), slip. op. at p. 743n.14.

C. Reports or No Reports

The original spark for this Court's order that the facts be investigated was the apparent failure of appellant's counsel to keep his side of the plea bargain which would have triggered the Court's consideration of probation. As stated by the trial court on the record at the plea proceedings, appellant was to provide "a determination" of his "physical condition" by "a qualified neurosurgeon" (minutes of 4/10/72 at p. 5). The Court later found as a fact, which it also witnessed, that, "no report from a qualified neurosurgeon was presented for the Court's consideration at the time of

sentencing" (Decision and Order of the Court on appellant's motion for vacatur of sentence, dated December 20, 1973). This was the basis for the trial court's holding that appellant had not kept the bargain thereby justifying the court's refusal to impose probation.

The evidence that no report was submitted is substantial, and, appellant submits, it preponderates.

The sentencing judge himself, a witness to the facts, the man who would make the ultimate determination of jail or probation, and the factfinder on the issue of whether or not he saw doctors' reports, has stated unequivocally and has found as a fact in state proceedings on the issue of appellant's resentencing that no report was submitted. This finding of fact by a state judge who was also a witness to the facts and a direct participant in the plea bargain is admissible in evidence under habeas proceedings pursuant to 28 U.S.C. §§ 2245, 2247, 2254(f), and it is entitled to great weight in the consideration of the federal habeas corpus court, especially, as in this instance, where the finding of fact went unopposed and was, in fact, supported by the District Attorney of Westchester County (see discussion, infra), and was affirmed by the State appellate courts.*

*Leave to appeal was denied by the Appellate Division, Second Department, on March 12, 1974.

Furthermore, the state judge's determination is fairly supported by the state record in the case which is totally devoid of any indication that doctors' reports were submitted for the court's consideration.* Townsend v. Sain, 372 U.S. 293 (1963); LaVallee v. Della Rose, 410 U.S. 690 (1973). And, the state has not chosen on this hearing to attempt to refute the trial judge's findings by direct examination or written interrogatories or affidavits, as it had every legal opportunity to do. 28 U.S.C. § 2246. Appellant, on the other hand, quite properly relies on the findings of the state judge as to events which the judge himself witnessed. Obviously, the written opinion of the trial judge represents his best and truthful view of the facts, and it must be presumed he would not enshrine in such a document, without a hearing, the results of a possibly faulty memory. Appellant submits that the District Court's speculation on the trial judge's faulty memory is unfounded and therefore clearly erroneous. If speculation is a permissible basis for findings, then equally probable is that the judge did not remember the

*The County Court file contains no reports; the sentence minutes are lost; defense counsel admitted that the report remained in his own file, and the District Attorney testified that all official documents would be in the County Court file (82).

report because it was insignificant to his sentence considerations because it did not contain the required diagnosed total bed-ridden paralysis, which the judge mentioned only in-chambers outside appellant's presence. Thus, the faulty memory speculation supports appellant's contention, supra, that the judge intended a different bargain than the one he stated to appellant, and appellant is entitled to the requested relief on that ground.

In addition to appellant and the trial judge, a third witness to the state proceedings, the District Attorney, corroborates the absence of the report. The District Attorney who prosecuted appellant and who was present at the bargaining conferences and at the plea and sentence, did not testify that he saw reports submitted to the trial judge. Indeed, he was present at the very conference at which the attorney, Mr. Lerner, according to Lerner's own otherwise unsupported testimony, says he showed a letter of April 14, 1972 from a surgeon to the judge in chambers. The District Attorney does not corroborate Mr. Lerner; Mr. Rakacky did not testify that he saw a report submitted to the judge on that occasion. He did testify to personally receiving a letter from Mr. Lerner on February 8, 1972 (Petit. Ex. #4)

two months prior to the plea proceedings, where the bargain was first announced, and that this Lerner letter had attached to it a doctor's letter dated February 4, 1972 (Joint Ex. #1). There is no testimony that this February 4th letter from Dr. Rohman was ever shown to the judge. According to both Lerner and Rakacky, this letter was part of a communication between the two of them and resulted in a consent adjournment on the case due to appellant's inability on that date to come to court. Neither Lerner nor Rakacky testified that this letter was actually shown to the judge, and even if it had been, the promise of a possible probation conditioned on doctors' reports was made two months after this letter would have been shown to the judge and the promise was thus conditioned on other, updated reports.

The State of New York, in reply to appellant's applications in the state courts, and even in reply to the instant habeas corpus application, has always taken the same position as that of the state trial judge, that no reports were submitted. In reply affidavits of Assistant District Attorneys Robert O'Donnell and Benedict Palazzolo, dated July, 1972 and October, 1973, there is no mention of reports submitted to the trial judge (Ct. Exs. #7 & 8), and in an

affidavit of Assistant District Attorney Robert I. Gruber, dated February 21, 1974, submitted in reply to appellant's motion for leave to appeal from the very decision of Judge Couzens in which the judge found that no reports were submitted to him, the District Attorney agreed,

"Since no report from a qualified neurosurgeon was presented for the Court's consideration at the time of sentencing ...the Court rightfully refrained from further consideration of the possibility."
(Ct. Ex. #5 at p. 5)

Finally, in reply to appellant's instant habeas corpus application, the Attorney General of the State of New York, respondent on this hearing, stated, once again unequivocally, the state's position all along that, "In fact, the neurosurgeon's report was never supplied..." (Affid. of Assistant Attorney General David R. Spiegel, dated October 25, 1974, Petit. Ex. #9 at p. 5.)* Since the State of New York could always have produced the attorney who represented appellant at plea and sentence, the source of their only evidence on this hearing that a report was submitted, but chose

*In the same affidavit, the Attorney General argues that petitioner did not supply an affidavit from his attorneys to support his claim. Thus, the state has been aware all along of the new evidence it now belatedly presents on the hearing, but chose to argue against all these years.

not to do so and instead accepted the factfinding of the state trial judge, they should be estopped from taking the opposite position on this hearing and their evidence on the hearing should be adjudged accordingly.

Thus, only Mr. Lerner offers testimony that he showed a doctor's letter to the judge, specifically the April 14th letter from Dr. Gang (Joint Ex. #2). This testimony is nowhere supported in the record or in the other testimony on the hearing, and it is refuted by Judge Couzens, Assistant District Attorneys Gruber, O'Donnell and Palazzolo, unsupported by Assistant District Attorney Rakacky who was there,* and refuted by Assistant Attorney General Spiegel. All these sources, on the other hand, support and corroborate appellant's own testimony that he never saw any reports and that no reports were submitted.

We submit that in the face of all the evidence to the contrary, Mr. Lerner's self-serving testimony is in-

*Mr. Rakacky also refutes Mr. Lerner on another crucial aspect of the plea bargaining process in this case. According to Mr. Lerner, Mr. Rakacky took an adamant sentencing position that petitioner be jailed. Mr. Rakacky testified on the other hand that, while he would not have recommended probation in this case, he took no position on sentencing.

sufficient to form a basis for the ruling that Judge Couzens' affirmed findings of fact are clearly erroneous. The record supports the judge. United States ex rel. Cronan v. Mancusi, 444 F.2d 51 (2d Cir. 1971); United States ex rel. Coleman v. Mancusi, 423 F.2d 985 (2d Cir. 1970); United States ex rel. Coster v. Mancusi, 414 F.2d 743 (2d Cir., 1969). Mr. Lerner, an attorney of twenty years experience, testified that, although charged with the obligation to obtain and present to the Court, doctors' reports which might make the difference between jail and probation for a paralyzed client, he still, four years later, had the original of the letter in his own file and made no effort to document its presentation to the court. Copies of the letter (Joint Ex. #2) appeared nowhere. If Mr. Lerner had shown this letter to the judge, there would be documentation in the Court's file or in Lerner's own records. Mr. Lerner's own file was filled with carbon copies of covering letters of all sorts to document his providing various people with important papers and even relatively unimportant papers. This letter was the most important document in the case from appellant's standpoint; it contained the best possible statement of appellant's condition for the

purpose of a sentence of probation:

"With the aid of rehabilitation techniques, he was able to be ambulatory at the time of discharge from Grasslands Hospital, but still has significant weakness and sensory loss in the lower legs. I believe that a good deal of this disability will be permanent, but it is too soon to say with certainty."

(Joint Ex. #2)

If the court's promise of probation consideration was meaningful, then effective counsel would have insisted on open court sentence proceedings at which the letter would be introduced and the court would be required to say why under these circumstances it was insisting on sending to jail a partially paralyzed man who had been shot in the back by a cop while himself unarmed. Contrary to Mr. Lerner's misunderstanding of the law, the Code of Criminal Procedure provides for just such a procedure and for the submission of pre-sentence memoranda from counsel, and the C.P.L. was in effect and applied to the sentencing of appellant in this case. C.P.L. §§ 380.50, 390.40, 400.10.* With a record so

*Regardless of what had occurred in off-the-record in-chambers conferences, effective counsel had an obligation to protect the record for his client. And nothing would be lost by making the record since the Court had apparently already foreclosed probation in one of those conferences.

made, appellant, who requested that Lerner "do something" for him in the 30-day period following sentence (see Ct. Exs. #9 & 10), could have had a basis for an excessive sentence or unkept sentence promise appeal. But, Lerner filed no notice of appeal on appellant's behalf and his testimony that Mr. Pugh did not want to appeal is directly contrary to the documented request of appellant in his post-sentence letter asking Lerner to do something in the "30-day period," an obvious reference to the appeal period of which appellant was informed at the time of sentence. Had a record been made, an appeal on several grounds already mentioned could have been taken. In addition, Mr. Lerner himself testified that the judge had refused any motion made by appellant on May 8th, to withdraw his guilty plea (115); given the previous promises of the judge, this was an important ground for review of the sentence.

Appellant submits that the reason the Gang letter never made it from Lerner's file (from which the original was produced in court on these proceedings, four years later) to the Judge's hands, is because Lerner knew certainly by May 8th and 10th, that this letter would have no bearing on appellant's sentence, since it did not say that appellant

would be permanently and completely paralyzed, and he knew by his own testimony that this is what the judge had in mind when the plea promise was made (110, 130-133), and he knew on May 8th that the judge had made up his mind not to give probation (113-115). Lerner also felt strongly that, probation aside, this plea to a maximum seven years was a deal appellant could not, and should not refuse, and Lerner urged, "pushed" Mr. Pugh to take the plea (132, 139-146). Lerner knew probation was out; he believed the plea was the best possible deal for appellant; the letter became irrelevant as far as he was concerned and he neglected to present it to the judge.

Paradoxically, the court below agreed that Lerner may not have presented the reports because of these reasons, but held that the omission was harmless, because the on-the-record bargain that included the presentation of reports would have done appellant no good since the real in-chambers bargain was for a report unobtainable (decision below at p. 3). We submit the state cannot have it both ways, and, the court's findings as to the nature of the actual, but unstated bargain, requires vacatur of the sentence. Counsel was ineffective either way in permitting the stated bargain

to remain uncorrected or in failing to submit reports pursuant to the stated bargain. And, additionally, since he was counsel assigned by the state, a responsibility for his actions falls on the state. Mosher v. LaVallee, supra; Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974); Alvarez v. Wainwright, 18 Cr. L. 2141 (5th Cir. 1975); United States v. Calabro, 467 F.2d 973 (2d Cir. 1973); United States v. Morrissey, 461 F.2d 666 (2d Cir. 1972); People v. Montgomery, 24 N.Y.2d 130 (1969).

CONCLUSION

FOR THE ABOVE STATED REASONS, THE ORDER BELOW SHOULD BE REVERSED AND THE WRIT SHOULD ISSUE REMANDING THE CASE TO THE STATE COURTS FOR RESENTENCING.

Respectfully submitted,

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